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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 257.

SCHENLEY DISTILLERS, INC. and JOSEPH S. FINCH AND COMPANY,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONERS SCHENLEY DISTILLERS, INC. AND JOSEPH S. FINCH AND COMPANY.

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PETITIONERS' REPLY BRIEF.

This case raises a fundamental issue of constitutional law, never before passed upon by the courts; and the settlement of that important issue, by this Court, is of deep concern to a large segment of the American business public. The Petition shows this, and the government's answering brief suggests no doubt about it.

It is equally clear, the Petitioners respectfully submit, that that basic issue was wrongly decided below. The Petition demonstrated in detail that the arguments adopted by the Court of Appeals in its opinion, in sustaining the additional $1.50 tax, are devoid of any reality in law or in fact. And the government attorneys in their answering brief, apparently doubtful about the arguments adopted in the opinion below, now advance the startling proposition that the constitutional prohibition against the levy of any fed-

eral unapportioned direct tax on property applies only to some property, and not to all, as expressly held by this Court in the *Pollock* case.* The government attorneys assert that if the personal property happens to be consumable, it is not protected. They rely upon *Patton* v. *Brady*, 184 U. S. 608 (1902), the inapplicability of which had been so thoroughly demonstrated before the Court of Appeals that it was not even cited in that Court's opinion.

1. The major issue in this case is whether the additional $1.50 tax, enacted long after the whiskey had been distilled and exacted at an arbitrary date totally unrelated to any excisable transaction or event, was an unconstitutional direct tax on the property.

The "distillation tax" theory, to which the government's brief is largely directed, has no bearing with regard to that additional $1.50 tax. That tax was not put on the books until long after the spirits had been distilled; nor was such increased tax then "foreseeable". The complaint sets forth facts demonstrating in detail that what was foreseeable was a tax *decrease*, not an increase. Thus the additional $1.50 tax cannot be sustained, as in the opinion below, as a "retroactive" tax on "distillation".

2. Nor can the additional $1.50 tax be upheld, as in the opinion below, as an excise of the "privilege" of "holding" spirits in bond. The wholly theoretical nature of the opinion below on that point is confirmed by the inability of the government attorneys to face the facts, clearly set forth at pages 12-13 of the Petition, that

> (a) There was no tax on "holding". The amount of the tax bore no relation to the time the spirits were held in bond.

* *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429 (1895); rehearing, 158 U. S. 601 (1895).

(b) This very point was decided, contrary to the conclusion of the Court below in this present case, in the unanimous decision of this Court in *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288 (1921).

(c) The holding of whiskey in bond is in no sense a "privilege". The law commanded the petitioners to put their whiskey in the warehouse, and it commanded them, in all practical effect, to keep it there until they had a market. The whiskey could not conceivably have been withdrawn before the November 1, 1951 effective date of the $1.50 tax, and that tax thus avoided: the aggregate of all the net assets of the entire industry would have been sufficient to pay but a minute fraction of the tax. There was no choice. There was no "privilege."

3. Thus unable to advance any support for the grounds upon which the Court below placed its decision, the government attorneys are forced to the proposition that the Constitution prohibits only some unapportioned direct taxes, and not all. Consumable articles, they say, are in a class apart, and not protected against unapportioned direct taxes.

The Constitution contains no words of limitation or exception. The apportionment requirement, set out in the Constitution once affirmatively* and again negatively,** applies without qualification to all "direct taxes." This Court has recognized no exception. On the contrary, this Court's conclusion in the *Pollock* case was flatly that "taxes on personal property [as well as real property] are likewise direct taxes."*** And in that case this Court specifically referred to consumable articles, such as "products of the farm," as property upon which no unapportioned direct tax could be levied.****

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* Article I, Section 2, Clause 3.

** Article I, Section 9, Clause 4.

*** 158 U. S. at page 637.

**** 158 U. S. at page 627.

Nor does the *Patton* case, cited by the government attorneys in support of their novel proposition, afford any support for it. The *Patton* tax was a classic example of an indirect tax, paid by one and borne by another. It was levied on goods that had been voluntarily withdrawn from bond for marketing, and it was levied in circumstances where it was perfectly clear that the tax would be passed on by the wholesaler and ultimately to the consumer. The tax was upheld as an indirect or excise tax, not because the goods were consumable, but because the tax was levied in circumstances where it would be passed on to and thus borne indirectly by another.

Another example of a classic type of indirect tax was the floor stocks tax levied on whiskey at the same time that the additional $1.50 tax was enacted in 1951. That floor stocks tax was applicable to whiskey which had been voluntarily withdrawn from bond and tax-paid at the earlier and lower rate, and it was payable by wholesalers and retailers then holding the goods for sale.* Obviously, in those circumstances, the tax was going to be passed on to the consumer and thus operate as an indirect or excise tax.

The *Patton* tax, and the floor stocks tax on whiskey, are a far cry from the tax here challenged. These goods were not and never had been on their way to market. There was no market for them. They were simply being held by the owner in a warehouse. It was a foregone conclusion, at the very time the tax was exacted, at the arbitrary force-out date, that the tax would not and could not be passed on. Its impact upon the property itself was direct and inescapable.

The petitioners respectfully submit that this Court, having so categorically confirmed the unqualified Con-

* Revenue Act of 1951, Section 451(c), 65 Stat. 525.

stitutional mandate in the *Pollock* case, should not countenance the carving out of this unwarranted exception.

Conclusion.

As shown in the Petition and in this reply brief, the fundamental issue of constitutional law involved in this case is novel and important, and it was incorrectly decided below. The Petition should be granted.

Respectfully submitted,

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